Chun Cha Fu, Inc. *and* 318 Restaurant Workers Union. Case 2–CA–24245

September 30, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

On June 11, 1991, Administrative Law Judge Howard Edelman issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions, to modify his remedy,[2] and to adopt his recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Chun Cha Fu, Inc., New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.[3]

[1] In adopting the judge's finding that the Respondent violated Sec. 8(a)(5) of the Act by refusing to bargain over the effects of its decision to cease operations, we note that his analysis is consistent with *Willamette Tug & Barge Co.*, 300 NLRB 282 (1990).

The collective-bargaining agreement between the Respondent and the Union was executed on October 10, 1988, not October 1, as found by the judge.

[2] All remedial reimbursements to employees shall be made with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[3] We correct the judge's inadvertent error with respect to the date of the Union's letter requesting information. We also conform the ''in any like or related manner'' provision with the corresponding provision in the Order.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail or refuse to timely notify and bargain with Local 318 Restaurant Workers Union, as the exclusive bargaining agent of our regular full-time and regular part-time waiters and busboys, concerning the effects of the sale of our business on the unit employees.

WE WILL NOT refuse to furnish the Union with the information requested by it in its April 12, 1990 letter.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain in good faith with the Union as the exclusive bargaining representative of the unit employees specified above with respect to the effect on our employees of our decision to terminate our operation in New York, New York, and, if an understanding is reached, embody it in a signed agreement.

WE WILL furnish the Union with the information requested by it in its April 12, 1990 letter to us.

WE WILL pay to the terminated unit employees their normal wages for the period specified by the National Labor Relations Board.

CHUN CHA FU, INC.

Suzanne K. Sullivan, Esq., for the General Counsel.
Abraham Lebenkoff, Esq. (Lebenkoff and Coven), for the Respondent.

DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. This trial was heard before me on December 18, 1990, in New York, New York.

On March 28, 1990, 318 Restaurant Workers Union (the Union) filed a charge against Chun Cha Fu, Inc. (Respondent). An amended charge was thereafter filed on April 17, 1990. On July 31, 1990, Region 2, of the National Labor Relations Board issued a complaint against Respondent, alleging that Respondent failed to offer to the Union an opportunity to bargain concerning the effects of its decision to close its facility, and thereafter failed to provide the Union with information requested by the Union concerning the sale of Respondent's facility, in violation of Section 8(a)(1) and (5) of the Act.

Briefs were filed by counsel for the General Counsel and counsel for Respondent. On consideration of the briefs, the entire record, and my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

Respondent is a New York corporation, engaged in the operation of a restaurant in New York, New York. During the normal course of Respondent's operations, Respondent annually derived gross revenues in excess of $500,000, and purchased and received at its restaurant goods and materials valued at in excess of $5000 from business operations located in the State of New York, which received such goods and materials directly from firms located outside the State of New York.

I find Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.[1]

On October 1, 1988, Respondent and the Union executed a collective-bargaining agreement which stated, inter alia, that Respondent recognized the Union as the sole representative for all full-time and regular part-time dining room employees, including waiters and busboys and excluding all kitchen employees, office clericals, captains, managers, guards, and supervisors.

Article 33 of the agreement provided:

> [I]n the event that the Employer intends to sell or otherwise transfer the establishment or establishments covered by this Agreement, the Employer agrees that not less than ninety (90) days prior thereto, it will inform the Union in writing thereof, together with the name and address of the purchaser or transferee . . . . The Employer further agrees that it shall be a condition of the sale and inserted into any Agreement of sale that this contract and all of its obligations thereof shall be binding upon any purchaser or transferee.

In September 1989, Shu-Tah Lee, Respondent's owner, testified that he told Union Representative Dennis Law that he hoped to sell the restaurant or get a new lease. Law responded, ''Whether you sell or close, pay anything what the contract it say.'' This would appear to be a reference to severance and other contractual benefits due to employees in the event of sale or closure. At the time of such conversation there were no prospective buyers looking at the restaurant.

In November 1989, Lee commenced serious negotiations for the sale of his restaurant. Lee did not contact the Union when these negotiations began.

On January 31, 1990, a purchase agreement for the sale of Respondent's restaurant was finalized.

On the evening of January 31, the employees were notified by Lee of the sale and that the restaurant would close as of that night. Respondent closed its facility on February 1. No notice of the negotiations for the sale was given to any union official by Respondent at any time. Respondent's counsel stated at the time of trial of this case that Respondent did not give the union notice of the sale negotiations because it feared an employee walkout, and possibility that the sale might fall through. The Union eventually received notice of the sale from the employees terminated by Respondent as a result of the restaurant's closure.

Following Respondent's closure, the unit employees were paid vacation and severance pay as provided for in the parties' collective-bargaining agreement.

On April 12, 1990, Union Representative Law sent Respondent a letter by regular and certified mail requesting the following information:

> [A]ny and all documents, including but not limited to, memoranda, agreements and correspondence which relate to the sale or transfer of Chun Cha Fu Restaurant, Inc., or any of its assets.

Respondent denied receipt of such letter and has failed to supply the Union with any of the information requested.

Analysis and Conclusions

In various circumstances, an employer is required to bargain over the effects of a decision to sell his business. In *Kirkwood Fabricators*, 285 NLRB 33 (1987), enfd. 862 F.2d 1303 (8th Cir. 1988), a strikingly similar case, the Board, affirming the administrative law judge found the employer violated Section 8(a)(1) and (5) by failing to notify the Union of its decision to sell and thus failing to offer the Union an opportunity to bargain over the effects of such sale. In *Kirkwood*, as in the instant case, the employer deliberately refused to notify the Union of such pending sale because he was afraid that the Union might ''queer the deal'' and if news leaked out he would lose his employees. Respondent, in the instant case admittedly refused to notify the Union for substantially the same reason. The administrative law judge in *Kirkwood* concluded, in finding an unlawful refusal to bargain, that ''Respondent's secrecy, its presentation of a fait accompli sale, its failure to ever notify the Union of its decision, much less timely notify . . . are the crux of the violation'' Id. at 36. The same reasoning applies with equal force in the instant case. Respondent, by its willful concealment of its sale negotiations from the Union precluded meaningful bargaining over the effects of its decision to sell the restaurant. In this circumstance a subsequent request to bargain would be academic and unnecessary. Id. at 36; *John R. Crowley & Bros*., 297 NLRB 770 (1990).

Accordingly, I conclude that by its conduct described above, Respondent violated 8(a)(1) and (5) of the Act by failing to notify the Union of the sale of its business and bargain in good faith concerning the affects of such sale.

Respondent contends the Union waived its right to receive notice and to request bargaining over the effects. Such contention is based upon the September 1989 conversation between Respondent owner Lee and Union Representative Law during which Lee told Law he hoped to sell the restaurant, and Law replied, ''Whether you sell or close pay anything what the contract it say.''

I conclude Law's response to Lee was intended to convey to Lee Respondent's contractual obligations to the unit employees with respect to severance and vacation pay. It was not intended as a waiver of its contractual bargaining rights under article 33 of their collective-bargaining agreement. Moreover, at the time of this conversation Respondent was not engaged in any sale negotiations. Respondent's sales negotiations with the eventual buyer did not commence until at least November 1989. The Supreme Court has held that a union's waiver of statutory rights must be ''clear and unmistakable.'' *Metropolitan Edison Co. v NLRB*, 460 U.S. 693, 708 (1983). Accordingly, I find Respondent's contention of waiver by the Union is without merit.

[1] Counsel for Respondent denied the jurisdictional allegations alleged in the complaint. Counsel for the General Counsel contended jurisdiction could be taken based upon a stipulation of commerce by Respondent in a March 23, 1988 representation petition (Case 2–RC–20377) filed by the Union against Respondent which resulted in a Decision and Direction of Election. During the trial of this case, Respondent did not submit any evidence that it does not meet the Board's jurisdictional standard described above. Accordingly, I conclude that Respondent's stipulation of commerce in the representation case is sufficient to establish jurisdiction in the instant case. *Superior Industries*, 295 NLRB 320 (1989); *John Bogwell Farms*, 192 NLRB 547 (1971).

On April 12, 1990, the Union sent Respondent a letter requesting all documents relating to the sale of Respondent's restaurant.[2]

It is well settled that an employer must provide a union with requested information that is relevant to the union's function as the collective-bargaining representative of the unit employees. *NLRB v. Acme Industrial Co*., 385 U.S. 432 (1967).

The documents requested are clearly relevant to the Union's function as the unit employees' collective-bargaining representative. They relate to the sale of Respondent's business and have a direct effect upon the unit employees.

Accordingly, I conclude that Respondent, by failing to provide the Union with the information requested, additionally violated Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act, and the exclusive collective-bargaining representative of all Respondent's regular full-time and regular part-time waiters and busboys.

3. By refusing to timely notify and bargain in good faith with the Union about the effects of closing its business and terminating its employees, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

4. By refusing to furnish the Union with the information requested concerning the sale of Respondent's restaurant as set forth in the Union's April 12, 1990 letter, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes of the Act.

Because Respondent has no place of business to post a notice to employees regarding violations and remedy, I shall recommend that Respondent be ordered to mail signed copies of the notice to the Union and to all Respondent's unit employees employed by Respondent as of January 31, 1990. *Benchmark Industries*, 269 NLRB 1096, 1099 (1984).

As a result of Respondent's unlawful failure to bargain about the effects of its cessation of operations, the terminated employees have been denied an opportunity to bargain through their collective-bargaining representatives at a time when Respondent might still have been in need of their services, and a measure of balanced bargaining power existed. Meaningful bargaining cannot be assured until some measure of economic strength is restored to the Union. A bargaining order alone, therefore, cannot serve as an adequate remedy for the unfair labor practice committed.

Accordingly, I shall recommend that, in order to effectuate the purposes of the Act, Respondent bargain with the Union concerning the effects on its employees of the closing of its operations, and shall order a limited backpay requirement designed both to make whole the unit employees for losses suffered as a result of such violation, *Transmarine Navigation Corp*., 170 NLRB 389 (1968). Thus, Respondent shall pay unit employees backpay at the rate of their normal wages when last in Respondent's employ from 5 days after the date of the Board's Order until the occurrence of the earliest of the following conditions: (1) the date Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the closing of Respondent's operations on its employees; (2) a bona fide impasse in bargaining; (3) the failure of the Union to request bargaining within 5 days of the Board's Order, or to commence negotiations within 5 days of Respondent's notice of their desire to bargain with the Union; or (4) the subsequent failure of the Union to bargain in good faith; but in no event shall the sum to any of these employees exceed the amount he or she would have earned as wages from January 31, 1990, the date Respondent terminated operations, to the time he or she secured equivalent employment elsewhere, or the date on which Respondent shall have offered to bargain, whichever occurs sooner; provided, however, that in no event shall this sum be less than these employees would have earned for a 2-week period at the normal rate of their normal wages when last in Respondent's employ. Interest on all such sums shall be paid in the manner prescribed in *Florida Steel Corp*., 231 NLRB 651 (1977). See generally *Isis Plumbing Co*., 138 NLRB 716 (1962).

I shall also recommend that Respondent provide the Union with the information requested by it in its April 12, 1990 letter to Respondent.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Chun Cha Fu, Inc., New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to timely notify and bargain with Local 318 Restaurant Workers Union as the exclusive bargaining agent of its regular full-time and regular part-time waiters and busboys concerning the effects of the sale of its business upon the unit employees.

(b) Refusing to furnish the Union with the information requested by the Union in its April 12, 1990 letter, described above.

[2] Respondent impliedly, but not directly, denies receipt of the Union's April 12 letter which was sent by regular and certified mail. The Board recognized that proof of mailing by certified mail with the proper address and postage raises a rebuttable presumption of addressee's receipt of the letter in the ordinary course of delivery of such mail. *Communications Workers Local 9201 (Pacific Northwest Bell)*, 275 NLRB 1529 (1985). Respondent, by its implied denial, has not met its burden of rebutting the presumption that this letter was duly delivered to the addressee. *E. B. Manning & Son*, 281 NLRB 1124 (1986). Therefore, I find such letter was received by Respondent.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Pay the terminated unit employees their normal wages for the period set forth in the remedy section of this decision.

(b) Furnish the Union with the information requested by the Union in its April 12, 1990 letter to Respondent.

(c) On request, bargain in good faith with the Union as the exclusive bargaining representative of the unit employees specified above with respect to the effect on its employees of the decision to terminate its operations in New York, New York, and, if any understanding is reached, embody it in a signed agreement.

(d) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Mail in exact copy of the attached notice marked ''Appendix''[4] to the Union and to all employees employed by Respondent on January 31, 1990. Copies of said notice, on forms provided by the Regional Director for Region 2, after being duly signed by their authorized representative, shall be mailed immediately on receipt thereof, as herein directed.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps have been taken to comply.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''